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71-1413

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

October Term, 1971

No._____

STARLIE LOMAYAKTEWA, et al.,

*Petitioners,*

v.

HONORABLE HOWARD F. CORCORAN, United States District Court Judge, ROGERS C. B. MORTON, Individually and in his capacity as Secretary of the Interior, and PEABODY COAL COMPANY,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Native American Rights Fund
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Boulder, Colorado 80302

BRADFORD PRINTING, DENVER

# TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii
OPINIONS BELOW ..... 2
JURISDICTION ..... 2
QUESTIONS PRESENTED ..... 2
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED ..... 3
STATEMENT OF THE CASE ..... 3
REASONS FOR ALLOWING THE WRIT ..... 5
INTRODUCTION ..... 5
A MERE POSSIBILITY OF TRIABLE ISSUES REQUIRING WITNESSES DOES NOT SUPPORT TRANSFER ..... 6
CONCLUSION ..... 10
APPENDIX ..... 13

## TABLE OF AUTHORITIES

CASES:

*Chicago, R.I. & R.P. Co. v. Igoe*, 212 F.2d 378 and 220 F.2d 299 (7th Cir. 1954), *cert. denied* 350 U.S. 822 ..... 9

*Ewert v. Bluejacket*, 259 U.S. 129 (1922) ..... 10

*Fine v. McGuire*, 139 U.S. App. D.C. 341, 433 F.2d 499 (1970) ..... 6

*Ford Motor Company v. Ryan*, 182 F.2d 329 (2d Cir. 1950) ..... 6, 9

*Gerard v. Mercer*, 62 F. Supp. 28 (D. Mont. 1945), *reversed* on other grounds Gerard v. United States, 167 F.2d 951 (9th Cir. 1948) ..... 10

*Gulf Oil Company v. Gilbert*, 330 U.S. 501 (1947) 6, 9

*Hill v. Upper Mississippi Towing Corp.*, 141 F. Supp. 692 (D. Minn. 1956) ..... 9

*Levin v. Mississippi River Corporation*, 289 F. Supp. 353 (S.D. N.Y. 1968) ..... 9

*Nestor v. Hershey*, 138 U.S. App. D.C. 73, 425 F.2d 504 (1969) ..... 6, 9

*New York, Chicago & St. Louis Railroad Co. v. Vardaman*, 181 F.2d 769 (8th Cir. 1950) ..... 6

*Popkin v. Eastern Airlines, Inc.*, 253 F. Supp. 244 (E.D. Penn. 1966) ..... 9

*Shutte v. Armco Steel Corporation*, 431 F.2d 22 (3rd Cir. 1970) ..... 6

*United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938) ..... 10

*United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied* 352 U.S. 988 ..... 10

*United States v. Ahtanum Irrigation District*, 330 F.2d 897, 338 F.2d 307 (9th Cir. 1964), *cert. denied* 381 U.S. 924 ..... 10

*United States v. California*, 332 U.S. 19 (1947) .... 10

*Van Dusen v. Barrack*, 376 U.S. 612 (1964) ..... 9

*Wiren v. Laws*, 90 U.S. App. D.C. 105, 194 F.2d 873 (1951), *cert. denied sub nom. Wiren v. Paramount Pictures, Inc.*, 346 U.S. 938 ..... 6

STATUTES AND CONSTITUTIONAL PROVISIONS:

5 U.S.C. § 701 *et seq.* ..... 4

25 U.S.C. § 177 ..... 10

28 U.S.C. § 1254(i) ..... 2

28 U.S.C. § 1391(e) .....3, 6, 7

28 U.S.C. § 1404(a) .....2, 3, 5, 6, 7

Constitution and By-laws of the Hopi Tribe of Arizona ..... 3, 8

MISCELLANEOUS:

Senate Rep. No. 1922, 87th Cong. 2d Sess. 1962 U.S. Code Cong. and Adm. News pp. 2785-86 .... 7

Moore's Federal Practice, Vol. 7B §1391 JC583, 583.1 ..... 7

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*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioners Starlie Lomayaktewa, Emerson Susenkewa, Guy Kalchaftewa, Tom Humeyestewa, Neilson Honyaktewa, Norman Yoyhoma, Hastings Humiwaitewa, Cortez Lomahoklah, Claude Kewanyama, David Kevama, Charles Lomakema, Cyrus N. Josytewa, Augustine Mowa, Otis Polelonema, Byron Tymer, Taylor Wazzie, Evelyn Pela, Earl Pela, Herbert Talahaftewa, Ned Lomayestewa, Mina Lansa, John Lansa, King Poleyestewa, Harry Masayumptewa, Ira Puhuywtewa, Julius Calnimptewa, Mike Gashwazra, Nicholas Quomahu, Thomas Banyacya, Sr., Louis Smith, Cecil Calnimptewa, Henry Heemetewa, Logan Loma, Eli Selestewa, James Ponyah, Amelia Holmes, Daisy M. Albert, Melvin Tewa, Dan K. Evehema, Jack Pongyesvia, Lewis K. Naha, David Monongye, Madgelina Quan-

imptewa, Stanley Dash, Nelson Kursgorwa, Earl Talahongua, Amos Howesa, Hayungawa Silas, Sr., Lester Quanimptewa, Wilson Talashoma, David Calnimptewa, Ned Nayatewa, Earl Mumzewa, Gibson Namoki, Stewart Tuvinaghtewa, Preston Nakala, Woodrow Preston, Frank Chappella, Carlotta Shattuck, respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the District of Columbia entered in these proceedings on February 1, 1972.

## OPINIONS BELOW

The order of the Court of Appeals is unreported. The judgment and order of the District Court dated October 13, 1971, is also unreported. Both of the orders are included in the appendix.

## JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on February 1, 1972, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(i).

## QUESTION PRESENTED

In a proceeding brought in Washington, D.C., against the Secretary of the Interior under the Administrative Procedure Act to review his approval of Indian tribal council action alleged to be violative of the tribal constitution, did the Court of Appeals err in failing to find an abuse of discretion by the District Court when it ordered this case transferred under 28 U.S.C. §1404(a) where, because of petitioners' pending motions for summary judgment and defendants' pending motions to dismiss, there is a mere possibility of triable issues requiring oral testimony of witnesses?

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

*United States Code, Title 28:*

*§1404. Change of venue*

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

*United States Code, Title 28:*

*§1391. Venue generally*

(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. . . .

*Constitution and By-Laws of the Hopi Tribe of Arizona*

The pertinent text of the constitution and by-laws is set forth in the appendix

## STATEMENT OF THE CASE

The petitioners in this case are fifty-nine traditional and religious leaders and members of the Hopi Tribe of Arizona, including the four Hopi Kikmongwis (chiefs). Just as their ancestors were bound by religious principles to oppose

the influences of invading alien cultures destructive to the Hopi way of life, so, too, are the petitioners. The history of the Hopi Nation since the coming of the white man is a remarkable account of peaceful resistance by a deeply religious people to disruptive changes in their traditional structures. This legal action, the first by the Hopi authority in concert, is another episode in this struggle.

The Hopi traditional leaders, however, do not come before the Court without legal footing acknowledged by the white man. Their powers over Hopi land and life are protected by the Hopi Constitution and By-Laws of 1936. This document, the product of months of careful drafting, necessarily provided for traditional control of a tribal council it created in order to gain Hopi approval. With the acquiescence of the Secretary of the Interior, that Constitution has been violated by the tribal council time and time again to the detriment of petitioners. They now seek to correct the situation.

The petitioners brought this action in Federal District Court in the District of Columbia for judicial review under the Administrative Procedure Act, 5 U.S.C. §701 et seq., of the Secretary of the Interior's approval of a strip mining lease allegedly entered into by the Hopi Tribe of Indians (acting through the "Hopi Tribal Council") and the Sentry Royalty Company (hereinafter the "Black Mesa strip mining lease"). Pursuant to this lease, defendant Peabody Coal Company, assignee of Sentry Royalty Company, is now conducting strip mining operations on an area known as Black Mesa. The petitioners, who consider the strip mining of Black Mesa a sacrilege, contend that the Secretary's approval of the lease was unlawful on three separate grounds. First, the Secretary exceeded his authority in approving the lease executed by the "Hopi Tribal Council" because the

Council did not have the authority to lease the land. Second, the Secretary exceeded his authority in approving the lease because a quorum of the "Hopi Tribal Council" was not present when the lease was approved. Third, the Secretary acted arbitrarily and capriciously, and abused his discretion by interfering in the internal affairs of the Hopi Tribe, discriminating against the petitioners and in favor of other factions. The only relief sought is a declaration that the Secretary's approval of the Black Mesa strip mining lease is invalid, and an order setting aside the Secretary's approval.

On motion of both defendants, the Secretary of the Interior and the Peabody Coal Company, the District Court, per Corcoran, J., transferred this litigation to Arizona pursuant to 28 U.S.C. §1404(a). The District Court cited, in particular, petitioners' third cause of action alleging administrative discrimination and defendants' laches and estoppel defense as issues appearing to require oral testimony from Arizona witnesses. See, Appendix A.

Petitioners then sought relief in the form of mandamus in the Court of Appeals for the District of Columbia. The petition was denied. See, Appendix B.

## REASONS FOR ALLOWING THE WRIT

### INTRODUCTION

While paying lip service to the fundamental principle that plaintiffs' choice of forum should rarely be disturbed, the lower courts, in fact, relied on remote contingencies and defendants distorted view of this controversy to overcome the deference allegedly accorded the plaintiffs' statutorily conferred privilege. By granting certiorari in this case, this Court will have the opportunity to clarify the degree of permissible speculation by a lower court on the necessity for witnesses as a consideration in transfer under 28 U.S.C. §1404(a).

## A MERE POSSIBILITY OF TRIABLE ISSUES REQUIRING WITNESSES DOES NOT SUPPORT TRANSFER

Any analysis of the propriety of a transfer order must start with the premise that plaintiffs' choice of forum should be accorded great deference. This choice should not lightly be cast aside, unless the defendants make a strong showing that the "balance of convenience" is strongly in their favor. *Gulf Oil Company v. Gilbert*, 330 U.S. 501 (1947); *Wiren v. Laws*, 90 U.S. App. D.C. 105, 194 F.2d 873 (1951), *cert. denied sub nom. Wiren v. Paramount Pictures, Inc.*, 346 U.S. 938; *Shutte v. Armco Steel Corporation*, 431 F.2d 22 (3rd Cir. 1970); *Ford Motor Company v. Ryan*, 182 F.2d 329 (2d Cir. 1950); and *New York, Chicago & St. Louis Railroad Co. v. Vardaman*, 181 F.2d 769 (8th Cir. 1950).

The second basic premise is that there is a presumption in favor of reviewing the validity of the decision of an official who resides in Washington in the courts of the District of Columbia. *Nestor v. Hershey*, 138 U.S. App. D.C. 73, 425 F.2d 504 (1969) and *Fine v. McGuire*, 139 U.S. App. D.C. 341, 433 F.2d 499 (1970). Indeed, prior to the enactment of 28 U.S.C. §1391(e) in 1962, this action could have been brought only in the District of Columbia.

This case presents this Court with an opportunity to consider for the first time the relationship between sections 1391(e) and 1404. The practical effect of the transfer order is to require that actions of this type which formerly could have been brought only in the District of Columbia must now, as a result of the enactment of 1391(e), be brought where the plaintiffs reside. There is nothing in 1391(e) or its legislative history to indicate that plaintiffs

were to be deprived of their choice of forum. The purpose of the 1962 amendment to section 1391 was to make it easier for actions to be brought against federal officials.* Thus, requiring that this action be brought in Arizona is contrary to the spirit of the 1962 amendment. Petitioners submit that reconciliation of the intent behind section 1391(e) with section 1404 requires at a minimum that the plaintiffs' choice of forum prevail until it is certain that a trial resulting in substantial inconvenience will be necessary.**

These two fundamental premises may not be controlling in every case, but they do impose a considerable burden on a party seeking to transfer an action against a governmental official out of the District of Columbia.

This burden on the moving parties was not met when the District Court ruled, in effect, that the showing of a mere possibility that oral testimony *might* be required is sufficient to justify transfer.

The parties have spent a great deal of time debating the extent to which any of the three causes of action alleged in the complaint, and the possible defenses to them, would necessitate the court's taking oral testimony. The procedural setting of this case is as follows: The defendant Peabody Coal Company has filed a motion to dismiss. Its motion is

*See Senate Rep. No. 1922, 87th Cong. 2d Sess. 1962 U.S. Code Cong. and Adm. News pp. 2785-86. See also 7B Moore's Federal Practice, §1391 JC583, 583.1.

**Petitioners argued before both the district court and the court of appeals that because of the possibility of a very substantial adverse impact of a decision in this case on the economy and the power and water supply of Arizona, transfer of this case to the District of Arizona would not be "in the interest of justice." The district court did not consider this factor relevant. By granting this petition, this Court would be presented with an opportunity to set forth guidelines to enable district courts throughout the country to determine where actions against government officials should be heard and resolved.

based upon general alleged infirmities that apply to all three causes of action (failure to join non-joinable indispensable parties and lack of jurisdiction to review so-called "intra-tribal disputes"). It also alleges specific infirmities for the individual causes of action (that as a matter of law the Hopi Tribal Council had authority to lease the lands in question; that, given the allegations of the second cause of action, as a matter of law a quorum was present when the Black Mesa strip mining lease was approved; and that the subject matter of the third cause of action is unreviewable because the challenged Secretarial action is "committed to agency discretion by law"). The federal defendant has indicated his intention to file a motion to dismiss based upon similar grounds.

Petitioners, on their part, have filed a motion for summary judgment on the first cause of action alleging that as a matter of law the Hopi Tribal Council was without authority to lease the lands in question. If their motion is granted with respect to the first cause of action, petitioners will be entitled to all of the relief they are seeking. Petitioners have also indicated to the court that they expect to file motions for summary judgment with respect to the second and third causes of action in the near future. The district court seemed to be receptive to the idea that the second and third causes of action would be susceptible to disposition by way of motions for summary judgment.

Based upon documentary evidence which has been authenticated, it is clear that the Secretary has conceded that the Hopi Constitution did not delegate leasing authority in the Tribal Council. The Secretary purported to make up this deficiency by taking it upon himself to delegate leasing authority to the Council, allegedly pursuant to Article VI, Section 3 of the Hopi Constitution. The decision to delegate

this authority was made in Washington by the Secretary himself. The first cause of action turns on the validity of this purported delegation. Thus, the case at bar is brought squarely within the holding of *Nestor v. Hershey, supra,* that when the issues in a case turn squarely upon the validity of an instruction or decision of an official who resides in Washington, the District of Columbia is a proper forum for resolving the matter in controversy. 425 F.2d at 522.

The second and third causes of action are also ripe for summary judgment because they too revolve around the construction of the Hopi Constitution and the relationship between the Secretary and various factions of the Hopi people. Most of the relevant facts will be revealed in government documents, nearly all of which are housed in the National Archives in Washington, D.C.

At the hearing before the district court on the motion, based upon the state of the record at this time, petitioners argued that it was highly unlikely that this case would proceed to trial. In any event, this case is clearly distinguishable from the ordinary cases in which transfer is granted — personal injury and business litigation that must either be settled or go to trial.* Petitioners contend that more is required to justify transfer than the bare possibility that a trial may be required.

The district court's order cited two aspects of this case which, in its view, might eventually require a trial, the defenses of laches and estoppel and certain aspects of the third cause of action relating to "the nature and even existence of

*See, *e.g., Gulf Oil Corp. v. Gilbert, supra; Van Dusen v. Barrack,* 376 U.S. 612 (1964); *Popkin v. Eastern Airlines, Inc.,* 253 F. Supp. 244 (E.D. Penn. 1966); *Chicago, R. I. & R. P. Co. v. Igoe,* 212 F.2d 378 and 220 F.2d 299 (7th Cir. 1954), *cert. denied* 350 U.S. 822; *Hill v. Upper Mississippi Towing Corp.,* 191 F. Supp. 692 (D. Minn. 1956); *Ford Motor Company v. Ryan, supra;* and *Levin v. Mississippi River Corporation,* 289 F. Supp. 353 (S.D. N.Y. 1968).

the separate Hopi factions." There is no factual dispute as to the nature and existence of these factions as government records and Hopi history show.

With respect to the defenses of laches and estoppel, the district court erred as a matter of law. 25 U.S.C. §177, as applied and interpreted in *United States v. Ahtanum Irrigation District*, 236 F.2d 321 at 334 (9th Cir. 1956), *cert. denied* 352 U.S. 988* and *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 at 422 (4th Cir. 1938), taken together with such cases as *Ewert v. Bluejacket*, 259 U.S. 129 (1922)** preclude acquisition by private parties of any interest in Indian lands by operation of the defenses of laches or estoppel. These cases hold that claims of Indian tribes, or of the United States, or of individual Indians against private parties, involving trust or restricted Indian lands are not subject to the defenses of laches, estoppel or statute of limitations. Therefore, as a matter of law, these defenses are inapplicable here and oral testimony is unnecessary.

At the very least, this record supports retention by the district court judge until the motions to dismiss and for summary judgment are decided. If these motions do not dispose of this proceeding because trial is required, the defendants and intervenors could then renew their original transfer motions.

## CONCLUSION

The petitioners are not part of the American mainstream. They are not the usual litigants. They have sought redress in the courts of an alien culture. We submit, that, in these

*For the sequel to the first *Ahtanum* case, see *United States v. Ahtanum Irrigation District*, 330 F.2d 899, 338 F.2d 307 (9th Cir. 1964), *cert. denied* 381 U.S. 924.

**See also *Gerard v. Mercer*, 62 F. Supp. 28 (D. Mont. 1945), *reversed* on other grounds *Gerard v. United States*, 167 F.2d 951 (9th Cir. 1948), and *United States v. California*, 332 U.S. 19 at 40 (1947).

circumstances, the courts should be even more reluctant to impose a forum not of the plaintiffs' own choosing.

As a practical matter, the effect of the transfer order is to transfer the plaintiffs' statutorily conferred privilege of forum selection to the defendants and to require the plaintiffs to conduct this litigation in their least favored forum. This result was accomplished only by ignoring the strong presumptions in favor of retaining this case in the District of Columbia. The district court simply assumed, without an adequate foundation, that if, contrary to petitioners' position, the taking of oral testimony is eventually required, it would be more convenient to hold the trial in Arizona.

For the reasons set forth in this petition, we respectfully submit that this Court should issue a Writ of Certiorari to review the judgment and order of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,
April, 1972

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# APPENDIX

TABLE OF CONTENTS
ORDERS BELOW

A. District Court for the District of Columbia, October 13, 1971 ..... 15

B. Court of Appeals for the District of Columbia, February 1, 1972 ..... 16

CONSTITUTIONAL PROVISIONS INVOLVED

C. Constitution and By-laws of the Hopi Tribe [in pertinent part] ..... 17

## A. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STARLIE LOMAYAKTEWA, et al.,

*Plaintiffs,*

vs.

FILED:
October 13, 1971
Civil Action
No. 974-71

ROGERS C. B. MORTON, et al.,

*Defendants.*

**ORDER**

This cause came to be heard on the motions of the defendants Secretary of Interior and Peabody Coal Company[1] to transfer the action to the Disrict of Arizona pursuant to 28 U.S.C. §1404(a). The Court, having heard oral argument and having considered defendants' memoranda in support of said motions and plaintiffs' opposition thereto, finds, that, for the convenience of the parties and witnesses and in the interest of justice, this case should be transferred to the District of Arizona.

Recognizing that deference should be accorded to the plaintiffs' choice of forum, the Court nevertheless considers that the peculiar circumstances of this case justify transfer. It is not at all clear that this case can be resolved on motion or cross motions for summary judgment without taking oral testimony. Plaintiffs' third cause of action which alleges that the Secretary of Interior unlawfully discriminated against the traditional Hopi people in favor of other factions, ap-

[1] Motions to intervene were filed by several interested parties who if permitted to intervene would join in the motions to transfer. Deeming that the Court selected to try the case should determine the parties thereto, this Court deferred any action on the motions to intervene. However, it permitted the would-be intervenors at the suggestion and with the consent of the plaintiffs to argue specially in favor of the motion to transfer.

pears, in particular, to involve factual issues as to the nature and even existence of the separate Hopi factions. In addition, the defendants raise the defenses of laches and estoppel the resolution of which may entail the taking of testimony. In the event these and other factual issues arise during the disposition of this cause, the testimony of Hopi Indians and other witnesses located in Arizona would be required.

In view of the strong possibility that this case may survive summary judgment motions and go to trial, it is this Court's opinion that trial of the case would be most convenient, expeditious and inexpensive in the District of Arizona. It is accordingly by the Court this 13th day of October, 1971,

ORDERED that this cause be transferred to the United States District Court for the District of Arizona pursuant to Title 28 U.S.C. Section 1404(a).

Howard F. Corcoran
Judge

## B. UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-2002

STARLIE LOMAYAKTEWA, et al.,

*Petitioners*

v.

HON. HOWARD F. CORCORAN, United States District Court Judge

FILED:
February 1, 1972
Civil Action
947-71

Before: McGowan and Robinson, Circuit Judges

**ORDER**

On consideration of the petition for writ of mandamus and of the responsive pleadings filed with respect thereto, it is

ORDERED by the Court that the aforesaid petition for writ of mandamus is denied and it is

FURTHER ORDERED by the Court that the order of this Court filed on December 14, 1971 staying the effectiveness of the District Court's order transferring the case to Arizona, is vacated.

*Per Curiam*

## C. CONSTITUTION AND BY-LAWS OF THE HOPI TRIBE

### Article III—Organization

Section 1. The Hopi Tribe is a union of self-governing villages sharing common interest and working for the common welfare of all. It consists of the following recognized villages:

First Mesa (consolidated villages of Walpi, Shitchumovi, and Tewa.

Mishongnovi.

Sipaulavi.

Shungopavi.

Oraibi.

Kyakotsmovi.

Bakabi.

Hotevilla.

Moenkopi.

Sec. 2. The following powers which the Tribe now has under existing law or which have been given by the Act of

June 18, 1934, (48 Stat. 981) and acts amendatory thereof or supplemental thereto, are reserved to the individual villages:

(a) To appoint guardians for orphan children and incompetent members.

(b) To adjust family disputes and regulate family relations of members of the villages.

(c) To regulate the inheritance of property of the members of the villages.

(d) To assign farming land, subject to the provisions of Article VII.

Sec. 3. Each village shall decide for itself how it shall be organized. Until a village shall decide to organize in another manner, it shall be considered as being under the traditional Hopi organization, and the Kikmongwi of such village shall be recognized as its leader.

Sec. 4. Any village which does not possess the traditional Hopi self-government, or which wishes to make a change in that government or add something to it, may adopt a village Constitution in the following manner: A Constitution, consistent with this Constitution and By-laws, shall be drawn up, and made known to all the voting members of such village, and a copy shall be given to the Superintendent of the Hopi jurisdiction. Upon the request of the Kikmongwi of such village, or of 25% of the voting members thereof, for an election of such Constitution, the Superintendent shall make sure that all members have had ample opportunity to study the proposed Constitution. He shall then call a special meeting of the voting members of such village, for the purpose of voting on the adoption of the proposed Constitution, and shall see that there is a fair vote. If at such referendum, not less than half of the voting mem-

bers of the village cast their votes, and if a majority of those voting accepts the proposed Constitution, it shall then become the Constitution of that village, and only officials chosen according to its provisions shall be recognized.

The village Constitution shall clearly say how the Council representatives and other village officials shall be chosen, as well as the official who shall perform the duties placed upon the Kikmongwi in this Constitution. Such village Constitution may be amended or abolished in the same manner as provided for its adoption.

## Article IV—The Tribal Council

Section 1. The Hopi Tribal Council shall consist of a chairman, vice-chairman and representatives from the various villages. The number of representatives from each village shall be determined according to its population, as follows: villages of 50 to 250 population, one representative; villages of 251 to 500 population, two representatives; villages of 501 to 750 population, three representatives; villages of over 750 population, four representatives.

The representation in the First Tribal Council shall be as follows:

| | |
|---|---|
| First Mesa | 4 |
| Mishongnovi | 2 |
| Sipaulavi | 1 |
| Shungopavi | 2 |
| Oraibi | 1 |
| Kyakotsmovi | 2 |
| Bakabi | 1 |
| Hotevilla | 2 |
| Moenkopi | 2 |

* * *

Sec. 4. Each village shall decide for itself how it shall choose its representatives, subject to the provisions of section 5. Representatives shall be recognized by the Council only if they are certified by the Kikmongwi of their respective villages. Certifications may be made in writing or in person.

Sec. 5. One representative of the village of Moenkopi shall be selected from the Lower District, and certified by the Kikmongwi of Moenkopi, and one representative shall be selected by the Upper District, and certified by the official whom that District may appoint, or who may be specified in a village Constitution adopted under the provisions of Article III, Section 4. This section may be repealed, with the consent of the Tribal Council, by vote of a two-thirds majority at a meeting of the voting members of Moenkopi village called and held subject to the provisions of Article III section 4.

Sec. 6. No business shall be done unless at least a majority of the members are present.

* * *

Article VI—Powers of the Tribal Council

Section 1. The Hopi Tribal Council shall have the following powers which the Tribe now has under existing law or which have been given to the Tribe by the Act of June 18, 1934. The Tribal Council shall exercise these powers subject to the terms of this Constitution and to the Constitution and Statutes of the United States.

* * *

(c) To prevent the sale, disposition, lease or encumbrance of tribal lands, or other tribal property.

* * *

Sec. 3. The Hopi Tribal Council may exercise such further powers as may in the future be delegated to it by the members of the Tribe or by the Secretary of the Interior, or any other duly authorized official or agency of the State or Federal Government.

Sec. 4. Any rights and powers which the Hopi Tribe of Indians now has, but which are not expressly mentioned in this Constitution, shall not be lost or limited by this article, but may be exercised by the members of the Hopi Tribe of Indians through the adoption of appropriate by-laws and constitutional amendments.

## Article VII—Land

Section 1. Assignment of use of farming land within the traditional clan holdings of the villages of First Mesa, Mishongnovi, Sipaulavi, and Shungopavi, and within the established village holdings of the villages of Kyakotsmovi, Bakabi, Oraibi, Hotevilla, and Moenkopi, as in effect at the time of approval of this Constitution, shall be made by each village according to its established custom, or such rules as it may lay down under a village Constitution adopted according to the provisions of Article III, section 4. Unoccupied land beyond the clan and village holding mentioned shall be open to the use of any member of the Tribe, under the supervision of the Tribal Council. Nothing in this article shall permit depriving a member of the Tribe of farming land actually occupied and beneficially used by him at the time of approval of this Constitution, but where an individual is occupying or using land which belongs to another by agreement with the owner, that land shall continue to belong to that owner.

* * *

## CERTIFICATION OF ADOPTION

* * *

I, Harold L. Ickes, the Secretary of the Interior of the United States of America, by virtue of the authority granted me by the act of June 18, 1934 (48 Stat. 984), as amended, do hereby approve the attached Constitution and By-laws of the Hopi Tribe.

All rules and regulations heretofore promulgated by the Interior Department or by the Office of Indian Affairs, so far as they may be incompatible with any of the provisions of the said Constitution and By-laws are hereby declared inapplicable to these Indians.

All officers and employees of the Interior Department are ordered to abide by the provisions of the said Constitution and By-laws.

Approval recommended December 14, 1936.
John Collier,
Commissioner of Indian Affairs.

Harold L. Ickes,
Secretary of the Interior
[seal]

Washington, D.C., December 19, 1936.

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IN THE

# Supreme Court of the United States

October Term, 1971.
No. 71-1418.

STARLIE LOMAYAKTEWA, *et al.*,

*Petitioner,*

*vs.*

HONORABLE HOWARD F. CORCORAN, United States District Court Judge, ROGERS C. B. MORTON, individually and in his capacity as Secretary of the Interior, and PEABODY COAL COMPANY,

*Respondents.*

**Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.**

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## SUBJECT INDEX


Page

Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia ..... 1

Conclusion ..... 5


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## TABLE OF AUTHORITIES CITED

### Cases


Cross-Florida Barge Canal, In re, 329 F.Supp. 543 (1971) ..... 2

Friends of the Earth v. Armstrong, Civil No. 3273-70 (D.D.C. 1971) ..... 2

Gulf Oil Corporation v. Gilbert, 330 U.S. 501 (1947) ..... 2

Jicarilla Apache Tribe, et al. v. Morton, Civil No. 1089-71 (D.D.C. 1971) ..... 2

National Windlife Federation, et al. v. Morton, Civil No. 1090-71 (D.D.C. 1971) ..... 2

Wilderness Society v. Morton, Civil No. 928-70 (D.D.C. 1970) ..... 2

Yazzi v. Morton, Civil No. 938-71 (D.D.C. 1971) ..... 2


### Rules


California Rules of Court, Rule 19 ..... 1


### Statute


United States Code, Title 28, Sec. 1404 .....1, 2

IN THE

# Supreme Court of the United States

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**Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.**

By their present Petition for a Writ of Certiorari, petitioners seek review of a denial by the Court of Appeals for the District of Columbia of their application for a Writ of Mandamus to vacate an Order transferring the case to the District of Arizona, pursuant to 28 USC §1404. Basically, petitioners are asking that this Court review a discretionary ruling on an interlocutory order.

Petitioners have made no showing, as required by Rule 19, that "special and important" reasons exist for such a review. No conflict among the circuits concerning the interpretation of §1404 has been alleged. Indeed, none exists. The courts of appeal have uni-

formly held that local controversies which touch the affairs of many persons should be tried "in their view and reach rather than in remote parts of the country." [*Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 509] (1947). Recent cases have held that transfer is particularly appropriate where local environmental considerations form the principal reasons for suit. [*In re Cross-Florida Barge Canal*, 329 F.Supp. 543 (Judicial Panel on Multidistrict Litigation 1971); *Friends of the Earth v. Armstrong*, Civil No. 3273-70 (D.D.C. 1971); *Wilderness Society v. Morton*, Civil No. 928-70 (D.D.C. 1970); and *Yazzi v. Morton*, Civil No. 938-71 (D.D.C. 1971)] The present case is part of a general attack on the power plants involved in *Jicarilla Apache Tribe, et al. v. Morton*, Civil No. 1089-71 (D.D.C. 1971); *and National Wildlife Federation, et al. v. Morton*, Civil No. 1090-71 (D.D.C. 1971). These cases have already been transferred to Arizona.

Petitioners do not actually take issue with the accepted interpretation of §1404. Rather, they claim that the usual rules should not apply because the "prospects for this case ever going to trial are remote."[1] The question now presented, they assert, is whether the District Court abused its discretion in view of the "mere possibility" of any triable issues which would require testimony. The District Court, however, was not persuaded by any such expedient assessment of the case. Judge Corcoran in his transfer Order stated:

> "It is not at all clear that this case can be resolved on motion or cross-motions for summary judgment without taking oral testimony."

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[1]Plaintiffs' Memorandum of Points & Authorities in Opposition to Motions to Transfer, p. 11.

Petitioners nonetheless persist in this approach, still stating that the District Court "seemed to be receptive to the idea" that the second and third causes of action could be disposed of by summary judgment.[2] (Petition, p. 8.) Quite to the contrary, the District Court's Order explicitly states that the third cause of action appears "in particular, to involve factual issues as to the nature and even existence of the separate Hopi factions." The Court ordered the transfer "in view of the strong possibility that this case may survive summary judgment motions and go to trial," in which case "the testimony of Hopi Indians and other witnesses living in Arizona would be required." Surely the place of trial cannot be determined upon the assumption that there will be no trial, or based upon speculation as to the outcome of motions not yet heard, and in some instances not yet filed. In any event, the result that the petitioners are seeking is that this Court review the District Court's determination that the resolution of this case is likely to necessitate the taking of oral testimony. Such an issue does not warrant review by this Court.

While petitioners attempt to posture this case merely as a suit to review an administrative act of the Secretary of the Interior, involving legal issues only, it is in truth an internal dispute among members of the Hopi Indian Tribe. The complaint involves innumerable local factual issues. In 1966, the Hopi Tribal Council entered into a mining lease now held by the defendant Peabody Coal Company. A similar lease was also made with the Navajo Tribe, since title to the leased Black Mesa lands rests jointly with the Hopi and Navajo

[2]While the plaintiffs have stated several times that they expect to file such motions for summary judgment, they have not done so.

Tribes, subject to the trust title of the United States. Plaintiffs represent a dissident faction of Hopi Indians, and the sole purpose of this suit is to void the Peabody lease. Their principal attack is against the actions of the Hopi Tribal Council, and the real parties in interest are the parties to the lease, namely the defendant Peabody Coal Company and the members of the Hopi and Navajo Tribes, acting through their respective Tribal Councils.

Petitioners' complaint alleges that the Hopi Tribal Council, by entering into the mining lease, exceeded its intended authority under the Hopi Constitution, and violated rights intended to be reserved to plaintiffs in the Black Mesa lands. A second cause of action alleges that five members of the Hopi Tribal Council, essential for a quorum, were improperly seated at the time the lease was approved in 1966. And a third cause of action charges the Secretary of the Interior with having engaged in a "pattern and practice of discriminating against the traditional Hopi people and in favor of other factions;" having violated his fiduciary duty "to ensure the survival of traditional Hopi culture, religion, and way of life;" and having arbitrarily interfered "with the internal affairs of the Hopi Tribe, thereby making it possible for the Black Mesa Strip Mining Lease to be executed and approved." (Complaint, pp. 18-19.) Local issues of fact concerning tribal beliefs, structure and activities are embraced within the allegations of each of the three causes of action, and clearly such allegations require tribal testimony. The District Court acted well within its discretion in transferring the case to the home area of the people most affected.

The true reasons underlying plaintiffs' resistance to the transfer Order have not been mentioned in their

petition. Before the Court of Appeal petitioners suggested that all federal judges in Arizona were "subject to being influenced by outside interests" and that any decision adverse to plaintiffs "carries on its face an appearance of impropriety." (Petition for Writ of Mandate, p. 21.) Consistent with this view, they labeled the District of Arizona an "oppressive" and "hostile" forum, which for good reason they had "shunned." (*supra*, pp. 22, 18.) Appropriately, these arguments have not been renewed in the present petition. They explain, however, what petitioners are really trying to accomplish.

**Conclusion.**

No issues of law are involved in this petition, and no grounds exist for review by this Court. The District Court is vested with broad discretion in determining the place of trial, and the exercise of that discretion has already been upheld by the Court of Appeal. The Petition for Writ of Certiorari should be denied.

Dated May 26, 1972.

Respectfully submitted,

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